STATE OF MICHIGAN

COURT OF APPEALS

CURTIS E. CARTER III,

Plaintiff-Appellee,

V

DOT SCIENTIFIC, INC.,

Defendant-Appellee,

and

DOROTHY S. BOONE,

Defendant.

UNPUBLISHED
August 21, 2003

No. 237989
Genesee Circuit Court
LC No. 00-068715-CK

Before: Wilder, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Defendant[1] appeals as of right the circuit court order confirming and entering judgment on an arbitration award rendered in favor of plaintiff. We affirm.

The parties entered into a written independent contractor agreement on March 1, 1999. Pursuant to the parties' written agreement, plaintiff worked in the capacity of an independent contractor and sales representative for defendant, a Michigan medical laboratory supply and equipment company. The written agreement provided that plaintiff was assigned a territory, the State of Florida. The written agreement also provided that plaintiff would receive a forty percent commission on disposables and a fifty percent commission on equipment. Additionally, the written agreement contained the following provisions which are pertinent to a termination clause and an agreement to arbitrate clause, upon the present dispute:

> 7. **TERMINATION:** This contract may be terminated at any time by [plaintiff] or [defendant] without notice and without cause. If the contract is terminated, [plaintiff] shall be entitled to receive only the commissions receivable for products shipped at time of termination.

[1] "Defendant" refers to Dot Scientific as Dorothy Boone is not a party in this appeal.

8. **ARBITRATION:** The parties agree that any controversy or claim of [plaintiff], including but not limited to race, age, sex or discrimination of any kind, wrongful or unjust termination of this Agreement, or breach of contract, arising out of or relating to this Agreement, or its breach, shall be settled by arbitration in the County of Genessee, State of Michigan, in accordance with the then governing rules of the American Arbitration Association. At the request of either [defendant] or [plaintiff], arbitration proceedings will be conducted in secrecy . . . . Judgment upon the award rendered may be entered and enforced in any court of competent jurisdiction.

14. **MISCELLANEOUS:**

*** * ***

C. Entire Agreement and Amendment: This Agreement contains the entire agreement of the parties. It may not be modified except by an agreement in writing executed by the parties hereof. This Agreement supersedes all pervious agreements between the Corporation and Contractor, both verbal and written.

* * *

G. Severability: The invalidity or unenforceability of any particular provision of this Agreement shall not affect the other provisions hereof; and this Agreement shall be construed in all respects as if such invalid or unenforceable provisions were omitted.

In early 2000, the parties reached an oral agreement that allowed plaintiff to solicit an account with the Joint Genome Institute ("JGI") outside of plaintiff's assigned territory. While the parties disagree on the scope of the agreement, specifically the extent to which plaintiff would be entitled to commissions on sales to JGI, there is no dispute that JGI submitted purchase orders to defendant beginning in or around March 2000, and that Plaintiff received commissions on shipments of product that occurred in March 2000. On May 15, 2000, defendant terminated its contract with plaintiff. Plaintiff thereafter requested commissions associated with sales to JGI occurring prior to plaintiff's termination, and this request was denied.

Plaintiff then filed an action in the Genesee County Circuit Court, alleging breach of contract, violation of the Sale Representative Commissions Act, MCL 600.2981, quantum meruit, fraudulent and innocent misrepresentation, promissory estoppel, breach of implied duty of good faith and unjust enrichment. Defendant filed a motion to dismiss and/or stay pending arbitration, relying on paragraph 8 of the parties' agreement which required arbitration of "any controversy or claim…arising out of or related to" the agreement. Defendant's motion was granted, and the matter was submitted to arbitration. On August 21, 1999, the arbitrator rendered an award in plaintiff's favor. The trial court denied defendant's motion to vacate the award on the ground that an error of law was not apparent on the face of the award. This appeal ensued.

Defendant first argues that an error of law is apparent on the face of the arbitration award, and that the arbitrator exceeded his authority by deciding claims outside of the agreement. In particular, Defendant asserts that the amount of the commissions awarded to plaintiff includes

commissions on products shipped after plaintiff was terminated, contrary to the parties' March 1999 agreement which limited the products on which plaintiff was entitled to receive commissions to those shipped at the time of termination. We disagree that an error of law is apparent. First, paragraph 14 C of the written agreement, which states that the agreement may not be modified except by subsequent written agreement signed by both parties, is a frequently seen but wholly nugatory provision. *Zurich Ins Co v CCR and Co*, 226 Mich App 599, 601; 576 NW2d 392 (1997), citing *Reid v Bradstreet*, 256 Mich 282, 286; 239 NW 509 (1931). In fact, "a written contract may be varied by a subsequent parol agreement unless forbidden by the statute of frauds." *Id*. Second, the arbitration clause of the agreement required arbitration of not only disputes pertaining to the agreement, but also disputes "*relating to*" the agreement. Since the parties agreed that the written agreement had in fact been modified by an oral agreement in early 2000, the arbitrator could properly determine both that the oral agreement *related to* the written agreement, rendering disputes about the oral agreement subject to arbitration, and that the oral agreement modified the written agreement as it concerned the payment of commissions. We find no error in the consideration or award of post-termination commissions on the face of the arbitration award.

Defendant next argues that the arbitrator's award of double damages under MCL 600.2961 was substantial error requiring the award to be vacated. Again, we disagree. Defendant claims that the statute does not apply where no commissions are due, but since we conclude that the face of the arbitration award which found that commissions were owed is not subject to challenge, we dispense with this argument. Defendant also claims that even if the arbitrator correctly concluded that plaintiff was owed commissions, there was no evidence that the commissions were withheld in bad faith and no justification to award double damages under MCL 600.2981. In *In re Certified Question (Kenneth Henes Special Projects Procurement v Continental Biomass Industries, Inc.)*, 468 Mich 109, 110-111; 659 NW2d 597 (2003), our Supreme Court rejected precisely this argument and held that double damages may be imposed when the principal purposefully fails to pay a commission when due, regardless of whether there is evidence of bad faith. Accordingly, we reject defendant's argument on this question.

Lastly, defendant argues that the arbitrator incorrectly assessed the amount of interest on plaintiff's damages. However, at the hearing held on defendant's motion to vacate the arbitration award, defendant specifically stated there was no objection to the arbitrator's calculation of interest:

> Defendant's Counsel: The only problem I have, Your Honor, is [sic] with the order is just the calculations of interest on the amounts, and just that there was no specification of the amount, and I don't think there has been an offer with respect to the expenses involved. Other than that we don't have any objections.
>
> Plaintiff's Counsel: The arbitrator indicated that the interest would be 12 [percent] interest compounded yearly under the statute 6013, on the $148,000, and not the attorney fee portion.
>
> Defendant's Counsel: I don't have any objection of [sic] that. It's the calculation of the costs.
>
> Plaintiff's Counsel: This $4,615?

Defendant's Counsel: Yeah.

Plaintiff's Counsel: It's from AAA, the American Arbitration Association. We submitted invoices.

Defendant's statement that there was no objection to applying a 12% rate of interest to the award of commissions of $148,000 constitutes a waiver of the claims regarding the award of interest now being asserted here on appeal. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 64 n4, 68-70; 642 NW2d 663 (2002).

Affirmed.

/s/ Kurtis T. Wilder
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra